

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
February 20, 2009 Session

**STATE OF TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES v.  
H. A. C.**

**Appeal from the Circuit Court for Cheatham County  
No. 5879     Robert E. Burch, Judge**

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**No. M2008-01741-COA-R3-JV - Filed March 26, 2009**

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In this dependent and neglect action, Mother appeals the trial court's finding that she committed severe child abuse. When the parents took their then seven-week-old child to the emergency room, the child was found to have a fractured femur and two fractured ribs. The child was immediately taken into state custody. Thereafter, the Department of Children's Services filed a petition against both parents to declare the child dependent and neglected as a result of severe child abuse. Mother contested the petition; Father did not. The juvenile court found the child dependent and neglected and additionally found that both parents had committed severe child abuse. Following an appeal to circuit court, the circuit court made the same findings. Mother appeals the finding that she committed severe child abuse. The evidence is sufficient to establish that the child was severely abused; however, the evidence does not clearly and convincingly prove that Mother severely abused the child. Accordingly, we reverse the finding that Mother committed severe child abuse.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed**

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

James A. Rose, Nashville, Tennessee, for the appellant, H. A. C.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; and Preston Shipp, Assistant Attorney General, for the appellee, State of Tennessee Department of Children's Services.

**OPINION**

This case originated when H. A. C. (Mother) brought her child, who was seven weeks old at the time, to the emergency room at Vanderbilt Hospital on February 13, 2008. The day before she brought the child to the emergency room, Mother had taken the child to the pediatrician because the child had been suffering from colic and was constantly crying. The pediatrician noticed a swelling

in the child's leg and instructed Mother to take the child to the emergency room at Vanderbilt Hospital.

At Vanderbilt, x-rays were taken of the child's leg that revealed a fractured femur. As a result, the hospital ordered x-rays of the child's entire body, which revealed the child also suffered from two broken ribs. Due to the nature of the injuries, the Child Abuse Review and Evaluation (C.A.R.E.) team was notified. The C.A.R.E. team conducted an evaluation and determined the child's injuries to be consistent with non-accidental trauma and child abuse. The physicians determined the fractured femur most likely occurred one to two days before the x-rays and the rib fractures were a minimum of nine days old.

A social services worker and an investigator interviewed Mother and Father to determine the cause of the child's injuries. Mother and Father gave a series of explanations, including the child falling six inches from a "bouncy seat" the previous week, incidents with a dog and a two year old, and Mother pushing down on the child's leg while changing his diaper. After consulting with physicians, it was determined that the explanations given could not have caused the child's significant injuries. Further investigation by the C.A.R.E. team resulted in explanations from Mother and Father that could have possibly caused the child's injuries: Mother admitted to pulling the child across the bed by the leg, and Father admitted to picking up the child and squeezing him around the chest and back while frustrated.

The Department of Children's Services filed a petition against both parents to declare the child dependent and neglected based in part upon severe child abuse. Father agreed to an Order of Adjudication that the child was dependent and neglected and to a finding that he committed severe child abuse. Mother contested the petition. Following a hearing on June 17, 2008, the juvenile court found the child dependent and neglected partly based on a finding that Mother had committed severe child abuse. Following an appeal by Mother, the circuit court found the child to be dependent and neglected and that Mother had committed severe child abuse. This appeal followed.

#### **STANDARD OF REVIEW**

A trial court's finding of severe child abuse must be supported by clear and convincing evidence. *Tenn. Dep't of Children's Servs. v. David H.*, 247 S.W.3d 651, 655 (Tenn. Ct. App. 2006). The "clear and convincing evidence standard" is more exacting than the "preponderance of the evidence" standard, although it does not demand the certainty required by the "beyond a reasonable doubt" standard. *In re C.W.W.*, 37 S.W.3d 467, 474 (Tenn. Ct. App. 2000). Evidence satisfying this high standard produces a firm belief or conviction regarding the truth of facts sought to be established. *Id.* The clear and convincing evidence standard defies precise definition. *Majors v. Smith*, 776 S.W.2d 538, 540 (Tenn. Ct. App. 1989). It is more exacting than the preponderance of the evidence standard, *Santosky v. Kramer*, 455 U.S. 745, 766 (1982); *Rentenbach Eng'g Co. v. General Realty Ltd.*, 707 S.W.2d 524, 527 (Tenn. Ct. App. 1985), yet it does not require such certainty as the beyond a reasonable doubt standard. *Brandon v. Wright*, 838 S.W.2d 532, 536 (Tenn. Ct. App. 1992); *State v. Groves*, 735 S.W.2d 843, 846 (Tenn. Crim. App. 1987). Clear and

convincing evidence eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence, *see Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992), and it should produce a firm belief or conviction with regard to the truth of the allegations sought to be established. *In re Estate of Armstrong*, 859 S.W.2d 323, 328 (Tenn. Ct. App. 1993); *Brandon*, 838 S.W.2d at 536; *Wiltcher v. Bradley*, 708 S.W.2d 407, 411 (Tenn. Ct. App. 1985).

Our review of the trial court's determinations on questions of fact is de novo with a presumption of correctness, unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d). To the extent the trial court's determinations rest upon an assessment of the credibility of witnesses, the determinations will not be overturned absent clear and convincing evidence to the contrary. *Wells v. Tennessee Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999).

### ANALYSIS

Mother does not contest the finding that the child is dependent and neglected. On appeal, Mother only challenges the finding that she committed severe child abuse, as that term is defined in Tenn. Code Ann. § 37-1-102(b)(21)(A).<sup>1</sup> "Severe child abuse" is defined, in relevant part, as:

The knowing exposure of a child to or the knowing failure to protect a child from abuse or neglect that is likely to cause great bodily harm or death and the knowing use of force on a child that is likely to cause great bodily harm or death.

Tenn. Code Ann. § 37-1-102(b)(21)(A).

William O. Cooper, M.D., the pediatrician in charge of the C.A.R.E. team, testified that it would take a tremendous amount of force to break the child's bones. J. Herman Kan, M.D., a pediatric radiologist, testified that the fractured ribs could only be caused by child abuse. Accordingly, the medical evidence in the record clearly demonstrates that the child suffered severe abuse, which Father has admitted to. Further, the juvenile court found Father committed severe child abuse, and that ruling was not appealed. Therefore, the question is not whether the child was subjected to severe abuse; rather, the question is whether *Mother* committed severe child abuse. We have determined that the evidence clearly and convincingly establishes that Father committed severe child abuse; however, the evidence does not support that finding as to Mother.

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<sup>1</sup> A finding of severe abuse triggers other important statutory provisions which have severe consequences. *See* Tenn. Code Ann. § 37-1-130(c); § 37-1-166(g)(4). One of the consequences is that "no child who has been found to be a victim of severe child abuse shall be returned to such custody at any time unless the court finds on the basis of clear and convincing evidence that the child will be provided a safe home free from further such brutality and abuse." Tenn. Code Ann. § 37-1-130(d). The most serious consequence of a finding that a parent has committed severe child abuse is that such a finding, in and of itself, constitutes a ground for termination of parental rights. Tenn. Code Ann. § 36-1-113(g)(4). The ground itself is proved by a prior court order finding severe child abuse, and the issue of whether abuse occurred is not re-litigated at the termination hearing.

The circuit court made a finding that Mother was not credible. This is a significant finding, one to which we accord great deference. The evidence does not preponderate against the finding that Mother's testimony lacked credibility due, in principal part, to the dubious explanations she gave to the healthcare providers in the emergency room on February 13, 2008, concerning how the child may have been injured. We acknowledge that her statements may be due to the fact that Mother was sixteen years old at the time. But, her age is no excuse for not truthfully answering questions. Mother's credibility notwithstanding, there is undisputed evidence, which is not dependent on Mother's testimony, that Mother frequently acted as a responsible parent by seeking medical attention for her child on several occasions during the seven weeks leading up to the trip to the emergency room. In fact, she had taken the child to receive medical attention on at least four occasions during this period, including taking the child to the pediatrician when the child was suffering from thrush and colic and on another occasion when the child was crying and spitting up.

We also find it significant that the day before she took her child to Vanderbilt, Mother took the child to the pediatrician because he was constantly crying. Upon examination, the pediatrician noticed a swelling in the child's leg and instructed Mother to take the child to Vanderbilt, which she did the following day. We also note that Dr. Kan's testimony indirectly supports Mother's claim that she timely sought medical care for the child when needed. Dr. Kan testified that the fractured femur occurred within a day or two of when Mother took the child to the emergency room. Because Mother took the child to the pediatrician the day before going to Vanderbilt, it appears that Mother may have taken the child to the pediatrician within hours of the leg injury.

It is important to note that child abuse is not excused by promptly seeking medical attention for the abused child. Accordingly, the fact that Mother frequently took her child to receive medical attention would not be a defense if there were clear and convincing proof that Mother knowingly abused the child or knowingly failed to protect the child from abuse. But, there is no direct evidence to establish that Mother knowingly abused the child or that she knowingly failed to protect the child from severe abuse by Father. Further, Mother's affirmative actions, including frequently taking the child to receive appropriate medical care, are inconsistent with those of a parent who knowingly harms a child or knowingly allows another to harm the child. All of the evidence in the record that someone severely abused the child directly points to Father. Considering the lack of evidence against Mother, one could only speculate that Mother may have abused the child, which is a far cry from satisfying the clear and convincing evidentiary standard that requires eliminating any serious or substantial doubt concerning whether Mother may have severely abused her child. *See Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992) (holding that clear and convincing evidence eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence).

There is, however, evidence suggesting that Mother may have failed to protect the child from Father's abuse. A troubling event occurred when Father "squeezed" the child's chest in frustration, causing the child to cry, and then handed the child to Mother. Mother did not harm the child, Father did; nevertheless, Mother did not immediately take the child for a medical evaluation. This occurrence is troubling, and reasonable minds may differ concerning whether Mother should have

taken affirmative action at this time. But, the record does not establish that the child's ribs were fractured on this occasion; to the contrary, it is just as likely that Father merely startled the child on this occasion and broke the child's ribs on another occasion when Mother was not present. The mere fact the child was crying when Father handed the child to Mother does not establish that the child's ribs were broken or that the child needed medical attention. Moreover, the fact the child was crying at the time does not establish that Mother knowingly failed to protect the child from severe abuse. Accordingly, the evidence does not clearly and convincingly establish that Mother knowingly failed to protect the child by not immediately seeking medical care for the child or by not reporting this event to medical providers or the authorities.

Mother, a sixteen year old with her first child, was an inexperienced parent who made mistakes. But, other than the dubious explanations she gave regarding the possible causes of the child's injuries, there is no evidence in the record to support a finding that Mother knowingly exposed her child to abuse or neglect that was likely to cause great bodily harm to her child. We, therefore, conclude that the record does not contain clear and convincing evidence that Mother committed severe child abuse. Accordingly, it is our duty to reverse the finding of severe child abuse as to Mother.

#### **IN CONCLUSION**

The judgment of the trial court is reversed as to the finding of severe child abuse by Mother, and this matter is remanded with costs of appeal assessed against the Department of Children's Services due to Mother's indigency.

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FRANK G. CLEMENT, JR., JUDGE